

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating
Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

July 31, 2008

ORDER

(Denying CRORIP's 10 C.F.R. § 2.335 Petition)

The Board denies the petition to expand the scope of this license renewal proceeding that was filed jointly by Nancy Burton and Connecticut Residents Opposed to Relicensing of Indian Point (CRORIP) pursuant to 10 C.F.R. § 2.335.¹ As discussed below, we take this action because the petition fails to make the prima facie showing of special circumstances that is a prerequisite to the granting of any exception to, or waiver of the regulations governing this matter.

In this case, CRORIP sought the waiver of two specific regulatory provisions that had been promulgated by the Nuclear Regulatory Commission (NRC or Commission) to govern the scope of licensing renewal proceedings for nuclear powered electricity generating plants.²

¹ Connecticut Residents Opposed to Relicensing of Indian Point and its Designated Representative's 10 C.F.R. § 2.335 Petition (Dec. 10, 2007) [hereinafter CRORIP Section 2.335 Petition].

² The regulatory authority relating to license renewal is found in 10 C.F.R. Parts 51 and 54. Part 51, concerning "Environmental Protection Regulations for Domestic Licensing and
(continued...)

Specifically, the Petitioners sought a waiver from the NRC's Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS) in the following areas: (1) "its exclusion of radiation exposures to the public and occupational radiation exposures during the license renewal term as Category 1 . . . issues which do not require site-specific analysis" and (2) "its use of the 'Reference Man' dose models from 1980."³ In support of this petition, CRORIP alleged, but did not demonstrate, the existence of special circumstances which it urged would justify the waiver of parts of the GEIS and expand such analysis into a site-specific inquiry.⁴

A party can successfully challenge issues outside of the proscribed scope of a nuclear generating plant relicensing proceeding only by petitioning for, and being granted, a waiver.⁵ Section 2.335 expressly allows this Board, on motion of a party, to certify a request for a waiver

²(...continued)

Related Regulatory Functions," implements NEPA requirements relating to license renewal. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit 1), 66 NRC 41, 62-65 (2007). Part 54 concerns the "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," and addresses safety-related issues in license renewal proceedings. Pursuant to this regulation the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs" is the issue that defines the scope of safety review in license renewal proceedings. Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 4 (2001).

³ CRORIP Section 2.335 Petition at 1.

⁴ Id. at 1-2. A summary of CRORIP's alleged special circumstances appears below at page 5. CRORIP also argues in support of its Petition that the process which produced the GEIS did not include components such as public input and operational conditions occurring post-adoption of the GEIS. Id. at 5. Assuming that these statements are accurate, they nevertheless offer no support for CRORIP's Section 2.335 Petition because they constitute a general challenge to the regulation rather than a site-specific challenge based on circumstances unique to Indian Point. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005). If CRORIP believes that the NRC's GEIS is defective, it may proceed with a petition for rulemaking under 10 C.F.R. § 2.802. It is not appropriate for CRORIP to challenge the validity of a NRC Regulation in the context of this proceeding.

⁵ Turkey Point, CLI-01-17, 54 NRC at 11-13.

to the Commission, which will then decide whether special circumstances exist to justify a waiver to consider issues beyond the normal scope of a license renewal proceeding.⁶ However, the findings which the Board must make in order to support the certification of a waiver petition to the Commission are very limited and very specific. Section 2.335(b) provides:

A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise (emphasis added).

Accordingly, in order to secure a waiver, Petitioners must show that circumstances exist, which are specific to the ongoing proceeding and are of a nature that the purpose for which the challenged regulation was promulgated would be perverted if applied as written in the ongoing proceeding. This provision requires, at a minimum, that circumstances specific to this proceeding “undercut the rationale for the rule sought to be waived.”⁷ Accordingly, in the Section 2.335 context, “[s]pecial circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived.”⁸

⁶ See 10 C.F.R. § 2.335(b).

⁷ Public Service Co. Of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988).

⁸ Id.

The GEIS was an amendment to the requirements of Part 51 for the purpose of establishing environmental review requirements for license renewals “that were both efficient and more effectively focused.”⁹ In order to increase efficiency and focus, the Commission categorized issues on which it found “generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants,” to be Category 1 issues.¹⁰ Category 1 issues involve “environmental effects that are essentially similar for all plants,” and thus “need not be assessed repeatedly on a site-specific basis, plant-by-plant.”¹¹ The regulations promulgating the GEIS set forth the purpose behind this human health standards as follows:

The Atomic Energy Act requires the Nuclear Regulatory Commission to promulgate, inspect and enforce standards that provide an adequate level of protection of the public health and safety and the environment. The implementation of these regulatory programs provides a margin of safety. A review of the regulatory requirements and the performance of facilities provides the bases to project continuation of performance within regulatory standards. For the purposes of assessing radiological impacts, the Commission has concluded that impacts are of small significance if doses to individuals and releases do not exceed the permissible levels in the Commission's regulations.¹²

For NEPA purposes, the Commission determined that occupational radiation exposure during the license renewal period is small where the projected maximum occupational doses during the license renewal term are within the range of doses experienced and permitted during normal operations.¹³

⁹ Turkey Point, CLI-01-17, 54 NRC at 11.

¹⁰ Id. (citing 10 C.F.R. Part 51, Subpt. A, App. B).

¹¹ Id.

¹² See Final Rule: Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,476 (June 5, 1996), amended by 61 Fed. Reg. 66,537 (Dec. 18, 1996).

¹³ 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1. Petitioners do not claim that exposure to radiation in surrounding areas exceeds the regulatory limits set by the Commission.

Given the purpose underlying the characterization of public and occupational radiation levels as Category 1 issues, the Board must consider whether CRORIP has demonstrated the existence of special circumstances which could justify waiving the Commission's regulations. In this proceeding, the alleged "special circumstances" relied upon by Petitioners are increased levels of Strontium-90 and cancer related illnesses in areas surrounding the Indian Point nuclear facility.¹⁴ CRORIP does not allege that radiation doses to the public or occupational workers rise above the permissible levels set by regulation; rather, the Petitioners point to a study completed by their expert that evidenced increased levels of Strontium-90 in baby teeth.¹⁵

However, CRORIP has presented no evidence that radiation levels differ for Indian Point as a unique problem compared to other nuclear power plants. Rather, this issue is common to a large group of nuclear power plants. Instead CRORIP argues that:

Indian Point's radiological emissions cannot be completely disregarded as a possible factor in the high levels of strontium-90 found in baby teeth near the plant and the correlation found between high strontium-90 levels and elevated cancer incidences in communities closest to the plant.¹⁶

CRORIP has submitted the Declaration of Joseph Mangano to support this argument.¹⁷ The Mangano Declaration, however, does not represent that radiological releases that have occurred in the past, or which may reasonably be anticipated in the future at Indian Point have, or likely will exceed established radiological dose limits.¹⁸ Likewise Mr. Mangano does not

¹⁴ Declaration of Joseph J. Mangano (Nov. 30, 2007) submitted as an exhibit with [CRORIP] and It's Designated Representative's Preliminary Petition to Intervene and Request for Hearing (Dec. 10, 2007) [hereinafter Mangano Declaration].

¹⁵ Id.

¹⁶ CRORIP Section 2.335 Petition at 6-7.

¹⁷ Id.

¹⁸ Even if excessive radiological emissions have occurred at Indian Point they would pertain to current operations and therefore would not be within the scope of this proceeding.

identify circumstances that are unique to Indian Point. To the contrary, as pointed out by the NRC Staff in their reply to CRORIP's petition, Mr. Mangano states that:

"Like all nuclear reactors" Indian Point Units 2 and 3 produce numerous fission products, including "Cesium-137, Iodine-31 and Strontium-90," and "like all nuclear power reactors, Indian Point 2 and 3 emit radioactivity, in the form of gasses and particles, into the air and water on a routine basis."¹⁹

The Board finds that the evidence presented by CRORIP fails to show special circumstances unique to the Indian Point nuclear facility (or an identified group of nuclear facilities) that would support a waiver of GEIS rules under Section 2.335(b). The Commission enacted the GEIS Category 1 exclusions with the recognition that radiation exposure is a safety issue affecting a large class of facilities.²⁰ The purpose behind those rules is to utilize an efficient and safe measure for regulating radiation exposure and dose levels that could properly protect the interests of the public.

CRORIP also asks for a waiver of the use of the "Reference Man" dose models used to calculate permissible levels of radiation exposure.²¹ CRORIP cites to a study that reports "women have a 52 percent greater chance than men of getting cancer from radiation exposure . . . [y]et, radiation protection regulations applicable to U.S. nuclear power plants is still stuck in the past - their 'reference' person is a man."²² For the Reference Man dose model, CRORIP is asking for a general regulatory change to take into account the actual doses of radiation

¹⁸(...continued)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 37-38 (2006).

¹⁹ NRC Staff's Response to the Petition for Waiver of Commission Regulations Filed by [CRORIP] at 8 (Jan. 22, 2008) (quoting Mangano Declaration ¶¶ 3-4).

²⁰ See NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (May 1996); 61 Fed. Reg. at 28,467; 10 C.F.R. Part 51, Subpt. A, App. B.

²¹ CRORIP Section 2.335 Petition at 7.

²² Id.

absorbed by women, children and fetuses – and state that “a central principle of environmental health protection – protecting those most at risk – women, children and fetuses – is missing from the regulatory framework.”²³

CRORIP’s issue is not limited to the issue of relicensing at Indian Point, but rather presents an argument against use of the Reference Man dose in any relicensing proceeding. CRORIP fails to show any special circumstances warranting a different dose model for permissible dose levels for the area specifically surrounding Indian Point. Rather, Petitioners issue a generalized grievance with Commission rules and regulations in the form of a rule waiver. “An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency’s regulatory process.”²⁴ The Board cannot find any evidence of special circumstances justifying a certification of the issue of the NRC’s use of the “Reference Man” dose models to the Commission. As noted by the Commission, Petitioners may file a petition for rulemaking under 10 C.F.R. § 2.802, which would be “the appropriate means for requesting Commission consideration of generic issues”²⁵

For the foregoing reasons, this Board cannot certify CRORIP’s challenge to the applicability of the challenged Commission Regulations to this license renewal proceeding because the petition fails to make a prima facie showing of special circumstance warranting a Section 2.335 waiver.

²³ Id.

²⁴ Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 252 (2006); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff’d in part on other grounds, CLI-74-32, 8 AEC 217 (1974).

²⁵ Millstone, CLI-05-24, 62 NRC at 562.

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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DENYING CRORIP'S 10 C.F.R. §2.335 PETITION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland
this 31st day of July 2008